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Supreme Court of the United States

OCTOBER TERM, 1993

BRAY TERMINALS, INC., DANA BRAY, JR., FORT NECK OIL TERMINALS CORP., ARTHUR MOTZKIN, KINGSTON OIL SUPPLY CORP., M. SPIEGEL & SONS OIL CORP., SLOMINS, INC., S.O.S. OIL CORPORATION, DOUGLAS PORTO, D.W. PORTO, WILLIAM FISCHBECK, WALLACE OIL COMPANY, INC., RAYMOND SLOMIN, SANDRA SLOMIN, IRWIN SLOMIN, EDWARD SLOMIN, BARBARA SALZMAN, LINDA HANDELMAN, SYLVIA SLOMIN, GEORGE SPIEGEL, PEGGY SPIEGEL, MARK SPIEGEL, JUDY LANDERS, RHODA SPIEGEL, ROBERT SPIEGEL, JEFFREY SPIEGEL, JODI SPIEGEL and RICHARD SPIEGEL,

Petitioners,

vs.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION – SECOND DEPARTMENT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Sections 208(9)(b)(4) and 612(b)(28) of the New York State Tax Law require only those persons engaged in interstate commerce to addback the New York State Gross Receipts Tax to their federal taxable income, when computing their annual state franchise/income tax liability. The questions presented are:

1. Whether Sections 208(9)(b)(4) and 612(b)(28) impermissibly violate the Interstate Commerce Clause, Article I, §8, cl. 3 of the United States Constitution.

2. Whether Sections 208(9)(b)(4) and 612(b)(28) impermissibly violate the Equal Protection Clause of the 14th Amendment, §1 of the United States Constitution.

LIST OF PARTIES PURSUANT TO RULE 29.1

The following statement is provided pursuant to Rule 29.1 of the United States Supreme Court Rules, which requires that this brief include a list of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of the petitioners.

Petitioner, Kingston Oil Supply Corp.'s parent is Getty Petroleum Corp. As of August 1, 1992, Petitioner S.O.S. Oil Corporation, merged into petitioner M. Spiegel & Sons Oil Corp. The affiliates of petitioner M. Spiegel & Sons Oil Corp. are S.O.S. Oil Corporation, Spiegel PT Co., Inc. and Scorpio Petroleum Corp.

Petitioners Bray Terminals, Inc., Fort Neck Oil Terminals Corp., Slomin's, Inc. and Wallace Oil Company, Inc. have no parent companies, subsidiaries or affiliates.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

LIST OF PARTIES PURSUANT TO RULE 29.1 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 3

STATEMENT OF THE CASE 3

A. The Article 13-A Gross Receipts Tax . . 5

1. History 5

2. Nature of the Article 13-A Gross Receipts Tax 6

B. The Addback Tax 7

C. The Proceedings Below 8

1. The Assessments 8

2. The Litigation 9

PAGE

REASONS FOR GRANTING WRIT 11

I. THE LOWER COURT MIS-CHARACTERIZED THE ARTICLE 13-A GROSS RECEIPTS TAX AND THE ARTICLE 9-A ADDBACK TAX 12

II. THE ADDBACK TAX FAILS THE COMPLETE AUTO TEST AND THUS UNCONSTITUTIONALLY BURDENS INTERSTATE COMMERCE 16

III. REVIEW BY THIS COURT IS WARRANTED SINCE THE LOWER COURT MISAPPLIED THIS COURT'S DECISION IN AMERADA HESS CORP. V. DIRECTOR, DIV. OF TAXATION 21

IV. THE ADDBACK TAX DENIES PETITIONERS EQUAL PROTECTION BY ARBITRARILY, CAPRICIOUSLY AND UNJUSTIFIABLY TREATING THEM DIFFERENTLY, AND THUS MORE HARSHLY THAN OTHER PETROLEUM BUSINESSES AND RESELLERS 25

CONCLUSION 28

PAGE

APPENDIX

Judgment of the Supreme Court of the State of New York, Nassau County, August 29, 1990 . . . . . App. 1-2

Memorandum of the Supreme Court of the State of New York, Nassau County (Morrison, J.) June 19, 1990 . . . . . App. 3-5

Decision & Order of the Supreme Court of the State of New York, Appellate Division, Second Department, March 29, 1993 . . . . App. 6-7

Order of the Court of Appeals of the State of New York, September 14, 1993 . . . . . App. 8

Order of the Court of Appeals of the State of New York, January 13, 1994 . . . . . App. 9

United States Constitution, Article I, §8, cl. 3 (Interstate Commerce Clause) . . . App. 10

United States Constitution, Fourteenth Amendment, §1 (Equal Protection Clause) . App. 10

New York State Tax Law Section 208(9)(b)(4) . . . . . App. 10-11

New York State Tax Law Section 612(b)(28) App. 11

New York State Tax Law Section 300(c) . . App. 12

New York State Tax Law Section 301(a) . . App. 13-14

TABLE OF AUTHORITIES

PAGE

CASES

Allied Stores of Ohio, Inc. v. Bowers
38 U.S. 522, 528 (1959) 25

Amerada Hess Corp. v. Director, Div.
of Taxation, 490 U.S. 66 (1989) 10, 20-24

American Telephone & Telegraph v. New York
State Department of Taxation and Finance,
599 N.Y.S.2d 238 (1st Dept. 1993) 19

American Trucking Assns., Inc.
v. Scheiner, 483 U.S. 266 (1987) 17

Armco, Inc. v. Hardesty,
467 U.S. 638 (1984) cert. den.
469 U.S. 912 (1984) 17, 18

Barringer v. Griffes,
1 F.3d 1331 (2d Cir. 1993) 18, 19

Boston Stock Exchange v. State Tax
Commission, 429 U.S. 318 (1976) 17

Castle Oil Corp. v. City of New York,
210 N.Y.L.J. 122, p. 21 (1st Dept. 1993) 12

Complete Auto Transit Inc., v. Bradley,
430 U.S. 274 (1977) reh. den.,
430 U.S. 976 (1977) 16-20

PAGE

Container Corp. of America v. Franchise Tax Board, 463 U.S. 159 (1983) 27

F.S. Royster Guano Co. v. Commonwealth of Virginia, 253 U.S. 412, 415 (1920) 25

Goldberg v. Sweet, 488 U.S. 252 (1989) 16-17

Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968), reh. den. 393 U.S. 901 13

Healey v. Beer Institute, Inc., 491 U.S. 324, 340 (1989) 20, 21

In Re Jefferson Lines, Inc., 15 F.3d 90 (8th Cir. 1994) 17

Koch Fuel, Inc. v. State of Oklahoma, 862 P.2 471, 480 (S.Ct. Okl. 1993) 18

Maryland v. Louisiana, 451 U.S. 725, 754 (1981). 16

Merit Oil of New York, Inc. v. New York State Tax Com'n., 443 N.Y.S.2d 604 (Sup. Ct., Albany Co. 1982) 5

Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 105 S.Ct. 1676, 1682, 84 L.Ed.2d 751 (1985) 26

PAGE

Orange and Rockland, Etc. v. New England Petroleum, 400 N.Y.S.2d 79, 81 (1st Dept. 1977) 13

Price v. Cohen, 715 F.2d 87 (3rd Cir. 1983), cert. den. 465 U.S. 1032 (1983) 25, 27

Quill Corp. v. North Dakota, 112 S. Ct. 1904 (1992) 16

Radio Common Carriers of New York, Inc. v. State of New York, 601 N.Y.S.3d 513 (Sup. Ct., N.Y. Co. 1993) 19

Schweiker v. Wilson, 450 U.S. 221 (1981) 26

Shell Oil Co. v. New York State Tax Com'n., 458 N.Y.S.2d 938 (3d Dept. 1983) 5, 17

Tyler Pipe Industries, Inc. v. Washington Dept. of Revenue, 483 U.S. 232 (1987) cert. den. 486 U.S. 1040 (1988) 18

Westinghouse Electric Corp. v. Tully, 466 U.S. 388, 404 (1984) 18

STATUTES, CONSTITUTIONAL PROVISIONS, ETC.

PAGE

26 U.S.C. §§162(a) 4, 7

26 U.S.C. §164(a) 4, 7

28 U.S.C. §1257(a) 3

26 U.S.C. §§4986-88 (Federal Windfall Profits Tax) 21, 22

United States Constitution, Fourteenth Amendment, §1 (Equal Protection Clause) . . . . . i, 3, 9, 26

United States Constitution, Article I, §8, cl. 3 (Interstate Commerce Clause) . . . . . passim.

Article 9-A of the New York State Tax Law 7, 8, 12

Article 13-A of the New York State Tax Law . . passim.

Article 22 of the New York State Tax Law 7, 8

Article 30 of the New York State Tax Law 7, 8

Gross Receipts Tax (GRT) . . . . . passim.

New York State Tax Law §182 5

New York State Tax Law §182-a 6

PAGE

New York State Tax Law §182(2)(a) 5

New York State Tax Law §182(4)(2)(a) 4

New York State Tax Law §182(12)(a) 5

New York State Tax Law §186-a(2-a) 19

New York State Tax Law §208(9)(b)(4) . . . . . passim.

New York State Tax Law §282-(a)(4) 13

New York State Tax Law §285-a(1) 13

New York State Tax Law §300(c) 3, 15

New York State Tax Law §301(a) 4-6, 13, 20

New York State Tax Law §303(b)(2) 6

New York State Tax Law §612(b)(28) . . . . . passim.

New York State Tax Law §1132 13

New York State Tax Law §1133(a) 13

New York State Tax Law §1150 19

Chapter 271 of the Laws of 1980 5

Chapter 481 of the Laws of 1981 6

Chapter 772 of the Laws 1966 (Enabling Act) 12

PAGE

L. 1983, c.400, §5 27

L. 1983, c.400, §8 6

L. 1983, c.400, §9 27

L. 1990, c.190, §212 . . . . . 12, 27

L. 1990, c.190, §225 . . . . . 12, 27

L. 1990, c.190 §385(q)(2) 12

New Jersey Business Corporation Tax 21, 23

§11-602, subd. 8(b)(3) of the
Administrative Code of the
City of New York 12

SUPREME COURT RULES

Rule 29.1 ii

OTHER AUTHORITIES

New York State Department of Taxation & Finance
Taxpayer Services Division, Technical Services
Bureau, TSB-M-83(22)C 4, 6, 7, 15

1 Multistate Corp. Income Tax Guide
(CCH) ¶¶125, 251 and ¶¶97, 318 and 321 11

No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

BRAY TERMINALS, INC., DANA BRAY, JR., FORT NECK OIL TERMINALS CORP., ARTHUR MOTZKIN, KINGSTON OIL SUPPLY CORP., M. SPIEGEL & SONS OIL CORP., SLOMINS, INC., S.O.S. OIL CORPORATION, DOUGLAS PORTO, D.W. PORTO, WILLIAM FISCHBECK, WALLACE OIL COMPANY, INC., RAYMOND SLOMIN, SANDRA SLOMIN, IRWIN SLOMIN, EDWARD SLOMIN, BARBARA SALZMAN, LINDA HANDELMAN, SYLVIA SLOMIN, GEORGE SPIEGEL, PEGGY SPIEGEL, MARK SPIEGEL, JUDY LANDERS, RHODA SPIEGEL, ROBERT SPIEGEL, JEFFREY SPIEGEL, JODI SPIEGEL and RICHARD SPIEGEL,

Petitioners,

- against -

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray for a Writ of Certiorari to review the Order of the Supreme Court of the State of New York, Appellate Division, Second Department, entered March 29, 1993, affirming the judgment of the Supreme Court of the State of New York, Nassau County.

OPINIONS BELOW

The Final Order of the New York State Court of Appeals, dated January 13, 1994, denying petitioners' motion for leave to appeal is not reported and is set forth in the Appendix to the Petition ("App.") at 9. The Final Order of the New York State Court of Appeals, dated September 14, 1993, dismissing sua sponte petitioners' notice of appeal is reported at 82 N.Y.2d 748, 602 N.Y.S.2d 806 and is reprinted at App. 8. The Decision & Order of the Supreme Court of the State of New York, Appellate Division, Second Department, entered March 29, 1993, is reported at 596 N.Y.S.2d 717 and is reprinted at App. 6-7. The Judgment of the Supreme Court of the State of New York, Nassau County, entered August 29, 1990, is not officially reported and is set forth at App. 1-2. The Memorandum Decision of the Supreme Court of the State of New York, Nassau County (Morrison, J.), dated June 19, 1990, is not officially reported and is set forth at App. 3-5.

JURISDICTION

The Judgment of the Supreme Court of the State of New York, Nassau County, was entered on August 29, 1990. The Order of the Supreme Court of the State of New York, Appellate Division, Second Department, affirming the Judgment of the Supreme Court, Nassau County, was entered on March 29, 1993. The Order of the Court of

Appeals of the State of New York dismissing sua sponte petitioners' notice of appeal for an appeal as of right was entered on September 14, 1993. On January 13, 1994, the New York State Court of Appeals denied petitioners' motion for leave to appeal.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statutory provisions involved in this petition are New York State Tax Law §§208(9)(b)(4), 612(b)(28), 300(c) and 301(a), which are set forth at App. 10-14; and Article I, §8, cl. 3 (the Commerce Clause) and the Fourteenth Amendment §1 (the Federal Equal Protection Clause) of the United States Constitution, which are set forth at App. 10.

STATEMENT OF THE CASE

Corporate petitioners are New York corporations engaging in the business of importing or causing petroleum products to be imported into New York State, as well as the marketing and reselling of petroleum products in New York State. Accordingly, they are considered "petroleum businesses" under §300(c) of Article 13-A of the New York State Tax Law ("Tax Law"). The individual petitioners are shareholders of the corporate petitioners, which have elected Sub-chapter S treatment under the Internal Revenue Code.

Respondent, New York State Department of Taxation and Finance (the "Tax Department"), is the taxing agency of

the State of New York and is responsible for assessing and collecting taxes under the authority of the Tax Law.

As petroleum businesses, all the corporate petitioners are subject to the Gross Receipts Tax of Article 13-A ("GRT"), imposed on their gross receipts from the sale of all petroleum products, where shipments are made to points within New York State. As long as a petroleum business takes title to petroleum outside New York State and ships or causes to be shipped into New York State 20,000 gallons or more of such petroleum at any time during its taxable year, the petroleum business is subject to the GRT. Tax Law §301(a); see also Tax Department, Technical Services Division, Technical Services Bureau TSB-M-83(22)C ("TSB-M-83(22)C").

Petitioners are also subject to Tax Law §208(9)(b)(4) (also known as the "addback provision or tax") which requires all Article 13-A petroleum businesses to report, as ordinary taxable income, the GRT they pay to the State, regardless of whether or not they could charge and collect the GRT from their customers. See Tax Law §§208(9)(b)(4) and 612(b)(28)[1]. However, in determining tax liability for federal income tax purposes, the GRT was and is fully deductible by a petroleum business. 26 U.S.C. §§162(a) and 164(a). It is the interaction of the Article 13-A GRT and the

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[1] Tax Law §612(b)(28) which applied to the individual petitioners, required them to addback to federal adjusted gross income, inter alia, the GRT imposed by Article 13-A, to the extent deductible in determining federal adjusted gross income. For simplicity purposes, the term "addback tax" will hereinafter refer to both Tax Law §§208(9)(b)(4) and 612(b)(28).

addback provision which gives rise to the present controversy. See Tax Law §§301(a), 208(9)(b)(4) and 612(b)(28).

A. The Article 13-A Gross Receipts Tax

1. History - Article 13-A was only the most recent in a long line of gross receipts taxes imposed by New York State. Its predecessors were each declared unconstitutional or superseded by Article 13-A. The first of the Gross Receipts Tax statutes, Tax Law §182, was passed by the Legislature by Chapter 271 of the Laws of 1980. It imposed an annual franchise tax on "oil companies" in the amount of two (2%) percent of their New York gross receipts from the sale of all products, effective June 18, 1980. "Oil companies" were initially defined to include all corporations engaged in operations producing, refining or selling petroleum; expressly excluded were those selling less than sixty million (60,000,000) gallons in New York during the immediately preceding taxable year. Tax Law §182(2)(a).

That statute was declared unconstitutional in Merit Oil of New York, Inc. v. New York State Tax Com'n., 443 N.Y.S.2d 604 (Sup. Ct., Albany Co. 1982). The Merit decision conclusively demonstrates that this Court can declare unconstitutional the type of tax at issue in this case.

Section 182 was then amended to incorporate a provision which required that the GRT be borne by the oil companies themselves and not passed through to consumers. See Tax Law §182(12)(a). In Shell Oil Co. v. New York State Tax Com'n., 458 N.Y.S.2d 938 (3d Dept. 1983), the court struck down this anti-pass through provision on federal Commerce Clause grounds.

Thereafter, by Chapter 481 of the Laws of 1981, the Legislature enacted a new petroleum Gross Receipts Tax, Tax Law §182-a, imposing a three-quarter (3/4%) percent tax, effective July 1, 1981, on oil companies. Section 182-a was subsequently replaced with Article 13-A of the Tax Law, effective July 1, 1983, which imposes a two and three-quarter (2 3/4%) percent tax on petroleum businesses. See L. 1983, c.400, §8.

2. Nature of the Article 13-A Gross Receipts Tax - The GRT applies solely to petroleum businesses and is imposed on a petroleum business's gross receipts earned during its taxable year. Tax Law §301(a). These gross receipts may be earned when: (a) a petroleum business sells gasoline in another state or country where its ultimate destination is New York State; or (b) a petroleum business sells gasoline in New York State after having imported it into New York State from another state or country; or (c) a petroleum business sells gasoline in New York State, after having purchased it in New York State from another petroleum business that imported the petroleum product into New York State at an earlier date. See Tax Law §303(b)(2) and TSB-M-83(22)(c).

The gross receipts from the sale of petroleum may be in cash, credit or property of any kind or nature. TSB-M-83(22)(c). They are without deduction for the cost of the property sold, cost of materials used, labor, services or other costs, interest or discount paid, or any other expense. TSB-M-83(22)(c).

The parties disagree as to whether or not petroleum businesses may charge (pass-through) the Article 13-A GRT to their customers. Respondent contends the pass-through is automatic. Conversely, petitioners argue that the terms of

the contracts and competitive conditions dictate whether the pass-through is available to a particular petroleum business.

B. The Addback Tax

In determining tax liability for federal income tax purposes, the GRT was and is fully deductible by a petroleum business. 26 U.S.C. §§162(a) and §164(a). Similarly, for Article 13-A taxes imposed on or after June 1, 1990, the GRT is fully deductible in computing New York State corporate and individual income tax liability pursuant to Article 9-A and Articles 22 and 30.

However, for Article 13-A taxes imposed prior to June 1, 1990, an Article 13-A petroleum business was required, in calculating its annual taxable income for State franchise or income tax purposes, to add back the GRT. Tax Law §§208(9)(b)(4) and 612(b)(28). Because the 1990 modifications to the Tax Law was not applied retroactively, the addback tax is still being assessed against each petroleum business's gross receipts prior to June 1, 1990. TSB-M-83(22)C.

Thus, the addback of the GRT is levied only on businesses (or shareholders of subchapter S corporations) that import or cause petroleum products to be imported into New York State. The addback tax is imposed on the GRT that the Article 13-A taxpayer must pay the Tax Department on its gross receipts. Thus, the addback tax is determined, not at the time of importation or sale of petroleum products, and not at any particular point in the distribution chain, but at the time the petroleum business's annual franchise tax return is due. That time could be as long as fifteen (15) months after the receipts were generated.

Non-Article 13-A petroleum businesses are not and have not been subject to the addback tax. Instead, the non-Article 13-A businesses are permitted to deduct the GRT which they pay to their suppliers as a cost of doing business. This preferential treatment exists even though the non-petroleum businesses, as dealers, bulk users, resellers and intrastate petroleum distributors are often times engaged in the same activities as petitioners and compete for the same customers as petitioners.

C. The Proceedings Below

1. The Assessments - Some of the petitioners have been issued assessments by respondent, claiming that petitioners owe the Tax Department hundreds of thousands of dollars of additional corporate franchise (Article 9-A) or personal income taxes (Articles 22 and 30) because petitioners did not add the GRT back to determine their respective tax liabilities to respondent. For example, petitioner Bray Terminals, Inc. did not pay the addback tax during the period 1984 through 1986 and was assessed an additional tax of $206,395.95, plus interest which continues to accrue daily. Bray's exposure now exceeds $350,000.00 alone.

The other petitioners, specifically, Wallace and the shareholders of Wallace, Spiegel, Fort Neck and Slomins, have paid their respective corporate franchise taxes and personal income taxes to respondent for the appropriate periods by adding back the GRT to determine their tax liabilities. These petitioners have applied for refunds which, to date, have been denied.

2. The Litigation - Petitioners raised the federal questions at issue here in their complaint. (R. 18-19)[2]. They brought this action in the Supreme Court of the State of New York, Nassau County, seeking a declaratory judgment, inter alia, declaring that Tax Law §§208(9)(b)(4) and 612(b)(28) impermissibly contravene Article I, §8, cl. 3 of the United States Constitution ("commerce clause") and Amendment 14, §1 to the United States Constitution (federal "equal protection clause") and are, therefore, unconstitutional and void. (R. 18-19). Respondent moved to dismiss the complaint. (R. 34)

The Supreme Court of the State of New York, Nassau County, granted respondent's motion to dismiss and declared Article 13-A and Tax Law §§208(9)(b)(4) and 612(b)(28) constitutional, as applied to petitioners. App. 1-2.

Thus, the Supreme Court, Nassau County, dismissed the complaint without hearing evidence, indeed without even an answer being filed. In dismissing the complaint, the state court held that the petitioner had failed to state a cause of action for relief under, inter alia, the federal constitutional claims.

The lower court recognized petitioners' constitutional argument that the addback provisions, Tax Law §§208(9)(b)(4) and 612(b)(28), impose an impermissible burden on interstate commerce and violate their guarantee to equal protection of the law. App. 3. However, the court found no prejudice against petitioners. App. 4.

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2 "R" followed by a number refers to the Record on Appeal before the Supreme Court of the State of New York, Appellate Division, Second Department.

Furthermore, the lower court determined that the GRT does not favor intrastate distributors either, to the disadvantage of the interstate petroleum businesses and that thus, there is no facial invalidity. App. 5.

In addition, the lower court concluded that where it is commercially possible, petitioners pass the GRT along to subsequent purchasers who may deduct the GRT as a cost of doing business. App. 4. Again without any evidence, the court determined that petitioners can and do factor the non-deductibility of the GRT into their product cost. App. 4-5.

The lower court read the GRT provisions to reflect a legislative intent to impose the GRT on petroleum products at the point of entry. App. 5. However, the court conceded that by reason of geography, New York State must rely on importation to obtain petroleum. App. 5.

Finally, the lower court cited only two (2) cases, one of which was Amerada Hess Corp. v. Director, Div. of Taxation, 490 U.S. 66 (1989), whose holding it woefully misapplied to the present controversy. App. 5.

Petitioners raised the same constitutional questions on appeal before the Supreme Court of the State of New York, Appellate Division, Second Department. (R. 8-9). After oral argument, that court affirmed without opinion.

Petitioners' notice of appeal to appeal to the Court of Appeals of the State of New York was dismissed sua sponte, upon the ground that no substantial constitutional question is directly involved. App. 8. Petitioners' motion for leave to appeal to the Court of Appeals was denied without opinion. App. 9.

REASONS FOR GRANTING WRIT

Petitioner has set forth important questions of federal law concerning a state's taxing power, which have not been, but should be settled by this Court.

This Court has yet to address the issue of whether a state can lawfully impose an addback tax only on companies engaging in interstate commerce and exempt all others from the tax without violating the interstate commerce clause and federal equal protection clause. The New York State addback tax requires only petroleum businesses who, by definition, engage in interstate commerce, to addback the GRT to their federal taxable income when computing their annual state franchise/income tax liability. Tax Law §§208(9)(b)(4) and 612(b)(28).

These issues are not unique to New York State or to the parties in this litigation and thus, are of enormous practical importance. Actually, the outcome here will affect the hundreds of petroleum businesses and their shareholders who imported petroleum into New York State during the relevant period, approximately 1983 - 1990.

Moreover, resolution of these important federal questions will provide guidance to legislatures in many other states who have or are considering similar addback taxes or provisions.

The overwhelming majority of states, like New York, use federal taxable income as the starting point for computing state corporate franchise/income tax liability, and many of those have addback provisions similar to New York's. 1 Multistate Corp. Income Tax Guide (CCH) ¶¶125, 251 and ¶¶97, 318 and 321.

Although the New York State Legislature repealed the addback tax, prospectively, effective May 25, 1990, the issue of the constitutionability of the addback taxes is still in the limelight. (See L. 1990, c.190, §§212, 225 and 385(q)(2). Just last December, in Castle Oil Corp. v. City of New York, 210 N.Y.L.J 122, pg. 21 (1st Dept. 1993), plaintiffs brought suit to declare the New York City addback tax invalid and unconstitutional. See §11-602, subd. 8(b)(3) of the Administrative Code of the City of New York.

That court found that under Chapter 772 of the Laws of 1966 (Enabling Act), the New York City addback provision should have been repealed simultaneously with the state addback provisions. Id. Thus, numerous taxpayers can now conceivably apply for and receive refunds relating to their adding back of the GRT in computing their New York City tax liabilities.

I. THE LOWER COURT MISCHARACTERIZED THE ARTICLE 13-A GROSS RECEIPTS TAX AND THE ARTICLE 9-A ADDBACK TAX

It is important to realize that what is at issue here is not the constitutionality of the Article 13-A GRT, but rather, the Article 9-A addback tax. However, because the addback tax is uniquely intertwined with the GRT, a thorough understanding of the GRT is essential. Unfortunately, the lower court utterly failed to comprehend the nature and purpose of the GRT and thus, completely missed the point of petitioners' challenge.

The Article 13-A GRT is a franchise tax imposed solely on petroleum businesses. Unlike the New York State sales and excise taxes on gasoline and diesel fuels, the GRT is not

imposed on the ultimate consumer of petroleum products. See Tax Law §282-(a)(4), 285-a(1), 1132 and 1133(a).

Contrary to respondent's claims, the GRT is not "imposed on all oil sold in New York State". It is not imposed so that "all products of the same type are fully taxed at one (1) point in the distribution chain". Nor is the GRT, as the lower court inaccurately described, a tax "imposed on petroleum products at the point of entry." App. 5.

Rather, the GRT can best be understood as a status tax, namely the status of a New York State purchaser of petroleum products that is engaged in interstate commerce. The GRT is imposed only on a petroleum business's gross receipts earned during its taxable year. Tax Law §301(a).

One of the errors committed by the lower court was in concluding that the pass-through of the Article 13-A GRT from a petroleum business to its customers, was automatic. This conclusion was drawn even in the face of New York and federal court decisions which have squarely held to the contrary. See Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968), reh. den. 393 U.S. 901; Orange and Rockland, Etc. v. New England Petroleum, 400 N.Y.S.2d 79 (1st Dept. 1977).

The addback tax is imposed on the total gross receipts taxes which the petroleum business must pay to the Tax Department each year. Thus, the addback tax is determined, not at the time of importation or sale of petroleum products, and not at any particular point in the distribution chain, but at the time a petroleum business's annual franchise tax return is due.

To summarize, petitioners contest the constitutionality of the addback tax which forbids a petroleum business from deducting, as a cost of doing business, the GRT which it pays to New York State on its gross receipts from the sale of all petroleum products in New York State. This discriminatory treatment of a petroleum business occurs regardless of whether or not the petroleum business imported the particular petroleum products sold, which resulted in the gross receipts, and regardless of whether or not the petroleum business could charge the GRT to its customers.

The discriminating effect of the addback tax can be further shown by two (2) simple illustrations.

Example 1

Company A sold petroleum products in New York State from January 1, 1985 through November 30, 1989, but neither imported nor caused petroleum products to be imported into New York State. Company A was, therefore, not an Article 13-A petroleum business. Since petroleum products, except in minute quantities, are not refined, manufactured, extracted, produced or compounded in New York State, the petroleum products Company A purchased for resale in New York State were imported into the State by its suppliers or the suppliers of its suppliers.

If Company A paid the GRT to its suppliers, it could (and certainly would) deduct the GRT as a cost of doing business for State income tax purposes. Company A was not required to add the GRT it collected from its customers and paid to its suppliers back to its taxable income for purposes of calculating its New York State income/franchise tax liability.

If Company A was not charged the GRT by its suppliers, it would not be required to pay this tax to the Tax Department and would not pass the tax through to its customers.

Example 2

On December 1, 1989, Company A purchased a barge load (approximately 420,000 gallons) of commercial fuel oil at CITGO Petroleum Corporation's terminal in Linden, New Jersey and paid for the shipment of this fuel oil into a terminal in New York State. Pursuant to Tax Law §300(c) and TSB-M-83(22)C, Company A's status was now that of an Article 13-A petroleum business.[3] All of its gross receipts for the calendar year were now subject to the Article 13-A GRT even though it did not become a petroleum business until December 1, 1989. The GRT Company A paid to its New York suppliers prior to December 1, 1989 can no longer be deducted for State income/franchise tax purposes from its taxable income when Company A prepares its annual income/franchise tax returns. At this late date, months after the sales, Company A may very well be unable to back-bill its former customers for the new non-deductible GRT now due on its formerly untaxed annual gross receipts.

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3 "A petroleum business becomes taxable under Article 13-A on the day it meets the definition of petroleum business as defined in Article 13-A. A petroleum business engaged in the sale of petroleum would become taxable for purposes of Article 13-A on the day it imports or causes petroleum products to be imported into New York State, as defined in this memorandum." TSB-M-83-(22)C.

II. THE ADDBACK TAX FAILS THE COMPLETE AUTO TEST AND THUS UNCONSTITUTIONALLY BURDENS INTERSTATE COMMERCE

In determining whether a state tax passes muster under the commerce clause, Article I, Sec 8, cl. 3 of the United States Constitution, courts apply the widely recognized four (4) part test articulated by this Court in Complete Auto Transit Inc., v. Bradley, 430 U.S. 274 (1977) reh. den., 430 U.S. 976 (1977). See Quill Corp. v. North Dakota, 112 S. Ct. 1904 (1992). The lower court, though, incredulously omitted any reference to the Complete Auto test in its decision.

Under the test stated in Complete Auto,

> "[N]o state tax may be sustained unless the tax:
>
> 1. has a substantial nexus with the state;
>
> 2. is fairly apportioned;
>
> 3. does not discriminate against interstate commerce; and
>
> 4. is fairly related to the services provided by the State."

Maryland v. Louisiana, 451 U.S. 725, 754 (1981).

Therefore, petitioners need only show that the addback tax fails to meet any one (1) of the above four (4) parts of the test to win its commerce clause challenge. See Goldberg

v. Sweet, 488 U.S. 252 (1989). See also In Re Jefferson Lines, Inc., 15 F.3d 90 (8th Cir. 1994).

A discriminatory effect upon interstate commerce (third prong of Complete Auto test) is asserted, where, as here, it is shown that the state has acted to impose costs upon interstate commerce which are not imposed upon local or intrastate commerce. Boston Stock Exchange v. State Tax Commission, 429 U.S. 318 (1976).

To adequately establish that the addback tax discriminates against interstate commerce, petitioners need not prove that the discriminatory effect of the statute is overwhelming. See Shell Oil v. New York State Tax Com'n., 458 N.Y.S.2d at 946 (3d Dept). 1983). Significantly, in reviewing commerce clause attacks on state taxes, this Court has examined the tax's actual or even secondary effects, rather than its terminology. American Trucking Assns., Inc. v. Scheiner, 483 U.S. 266 (1987). Accordingly, this Court has consistently struck down state taxes and regulations such as the addback tax here, that have the practical effect of burdening interstate commerce. See Armco, Inc. v. Hardesty, 467 U.S. 638 (1984) cert. den. 469 U.S. 912 (1984).

In Armco, supra, the controversial tax provided that two (2) companies selling tangible property at wholesale in West Virginia would be treated differently depending on whether the taxpayer conducted manufacturing in West Virginia or out of it. Id. Therefore, if property was manufactured in West Virginia, it was exempt from the wholesale tax. Id. at 642. However, if property was manufactured in another state and imported into West Virginia for wholesale purposes, a tax of .027 was imposed on the sale price. Id. This Court disallowed the wholesale

tax declaring that it discriminated against interstate commerce by exempting local manufacturers. Id. at 646.

The Armco holding was later cited with approval in Tyler Pipe Industries, Inc. v. Washington Dept. of Revenue, 483 U.S. 232 (1987) cert. den. 486 U.S. 1040 (1988) (business and occupation tax which was assessed only on products manufactured within Washington State and sold to out-of-state purchasers was held invalid.) See also Koch Fuel, Inc. v. State of Oklahoma, 862 P.2 471, 480 (S.Ct. Okl. 1993) (Oklahoma sales and use tax exemption for in-state manufacturers/sellers is unconstitutional because the exemption discriminates against out-of-state manufacturers/sellers).

It is irrelevant exactly how the additional burden on interstate commerce is imposed: it can be in the form of a higher tax rate on out-of-state activities, a tax credit for in-state activities, or as in this case, a disallowance of deductions for costs incurred only in connection with out-of-state activities. See Westinghouse Electric Corp. v. Tully, 466 U.S. 388, 404 (1984). "The discriminatory economic effect . . . would be identical." Id. Furthermore, this Court declined to attach any constitutional significance to formal distinctions in the way the discrimination occurs which lack economic substance. Id. at 405.

Most recently, in Barringer v. Griffes, 1 F.3d 1331 (2d Cir. 1993), the Second Circuit found that a Vermont motor vehicle purchase and use tax failed the third prong of the Complete Auto test. That court held that the tax discriminated against interstate commerce by providing an advantage to local producers whose products effectively cost

less under its tax scheme and made out-of-state purchases disadvantageous. Id.[4]

New York State taxes, such as the addback tax, are no strangers to scrutiny under the Complete Auto test. Within the past year alone, at least two (2) notable New York State tax statutes have been struck down as unconstitutional for impermissibly interfering with interstate commerce. See American Telephone & Telegraph v. New York State Department of Taxation and Finance ("ATT"), 599 N.Y.S.2d 238 (1st Dept. 1993); see also Radio Common Carriers of New York, Inc. v. State of New York, 601 N.Y.S.3d 513 (Sup. Ct., N.Y. Co. 1993) (Tax Law §1150, which imposed a monthly fee on paging devices, failed all four (4) prongs of the Complete Auto test and thus violated the interstate commerce clause of the United States Constitution).

In ATT, the appellant challenged the constitutionality of Tax Law §186-a(2-a) which permitted long distance telecommunication carriers to deduct access fees in direct proportion to the extent which that company does business within the State. 599 N.Y.S.2d at 240. Thus, Tax Law §186-a(2-a) had the effect of reducing the deduction for access fees (or creating a higher effective tax rate) for those long distance carriers having a higher proportion of property outside of New York. Id. at 241. The court struck down the statute as violative of the interstate commerce clause. Id. at 240.

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[4] The Vermont motor vehicle purchase and use tax also failed the fairly apportioned (second) part of the Complete Auto test since it was not internally consistent.

Here, the addback taxes are imposed on petroleum businesses and their shareholders, such as petitioners, solely because they engage in interstate commerce by importing or causing to be imported petroleum into New York State. Yet, even the lower court admits that because of geography and location, petitioners must engage in interstate commerce and, thus are subject to the addback tax. App. 5.

The discriminatory effect of the addback tax on petroleum businesses is undeniable. The addback tax of 9% (the corporate franchise tax rate in effect during the relevant period, see Tax Law §301(a)), when multiplied against the GRT rate of 2-3/4%, increases a petroleum business's tax liability by .2475%, greatly reducing its already minute profit margin. Obviously, in its practical effect and operation, the addback tax has a blockbusting impact on interstate commerce and significantly favors intrastate commerce. Therefore, the addback tax fails the Complete Auto test and should be held unconstitutional and void.

Although it is not necessary for petitioners to show that the addback tax is facially discriminatory in order to find it unduly burdensome under the commerce clause, the addback tax is nonetheless facially invalid. See Amerada Hess Corp. v. Director, Div. of Taxation, 490 U.S. at 76. The lower court found no facial invalidity concerning the GRT but did not specifically address the facial invalidity of the addback tax itself. App. 5.

However, by subjecting only petroleum businesses to the addback tax and exempting others, the New York State legislature has shown its intent to discriminate against those who import petroleum products. "This Court has followed a consistent practice of striking down state statutes that clearly discriminate against interstate commerce." Healey v. Beer Institute, Inc., 491 U.S. 324, 340 (1989).

Healey involved a statute which required out-of-state beer shippers to affirm that their posted prices for products sold to Connecticut wholesalers were, at the time of posting, no higher than the prices at which those products are sold in the bordering states. Id. at 326. This Court held that the statute, on its face, violated the commerce clause by discriminating against interstate commerce, since it applied only to brewers and shippers engaged in interstate commerce and not to those engaged exclusively in Connecticut sales. Id at 340.

III. REVIEW BY THIS COURT IS WARRANTED SINCE THE LOWER COURT MISAPPLIED THIS COURT'S DECISION IN AMERADA HESS CORP. V. DIRECTOR, DIV. OF TAXATION

The lower court improperly relied on this Court's holding in Amerada Hess Corp. v. Director, Div. of Taxation, 490 U.S. 66 (1989) and therefore, review by this Court is necessary. There are material factual and conceptual differences between this case and Hess making the lower court's dogged reliance on using Hess to support its findings, unreasonable and, frankly, wrong.

The taxes at issue in Hess, were the New Jersey Business Corporation Tax and the federal windfall profits tax. Id. at 68. The Business Tax applied only to net income derived in New Jersey. Id. It applied to all corporations doing business in New Jersey. Id.

After analyzing the New Jersey Business Corporation Tax as applied to the federal windfall profits tax, this Court found that the tax was not discriminatory on its face since it applied to all oil producers regardless of whether or not they

engaged in interstate commerce. Id. at 76[5]. Significantly, the appellants in Hess conceded that there was no discriminatory motive underlying the add-back tax. Id. at 77.

The significant differences between this case and Hess are numerous:

First, in Hess, the appellants oil producers challenged the constitutionality of a New Jersey addback tax which required them to include, for purposes of computing state tax liability, federal taxes paid by the appellants pursuant to the federal Windfall Profits Tax. See 26 U.S.C. §§4986-88. Id. at 68. On the other hand, petitioners are questioning the validity of state taxes, to wit, Tax Law §§208(9)(b)(4) and 612(b)(28), which are required to be added back to determine their corporate and individual state tax liabilities.

Second, unlike here, where there has been no evidentiary hearing, the Hess Court upheld the New Jersey tax only after the trial court had made many factual findings. Id.

Third, the New York addback tax, as applied to Article 13-A petroleum businesses, is discriminatory on its face since it applies only to resellers of petroleum products that are engaged in interstate commerce. Unlike the New Jersey addback tax which applied to certain companies because they produced oil--an activity that need not entail any interstate commerce--the New York addback tax applies, by definition,

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5 Significantly, the Supreme Court left for another day whether the addback provision would impermissibly discriminate against interstate commerce if it singled out the windfall profit tax for a deduction denial. 490 U.S. at 77.

only to petroleum companies that engage in interstate commerce. Companies that purchase the same amount of petroleum products in New York State, even from the same seller (i.e., CITGO), bear none of the burdens imposed by the add-back tax.

Fourth, petitioners, contrary to those in Hess, argue that the Legislature intended to burden and discriminate against the interstate commerce of petroleum products when it applied the add-back tax to petroleum businesses. Thus, unlike the New Jersey addback tax, the New York addback tax singles out the GRT for a deduction denial. See Tax Law §§208(9)(b)(4) and 612(b)(28). No other tax on petroleum products is subject to the addback provision. Moreover, the addback provision does not apply, generally, to all taxes measured on income, as does the New Jersey Business Corporation Tax.

Fifth, the addback tax clearly exerts pressure on companies not to engage in the interstate commerce of petroleum. If a petroleum business only buys in New York State, and does not import, the GRT it pays to its suppliers will be fully deductible for state income tax purposes. However, there is a financial penalty enacted by New York State, for engaging in the interstate transportation of petroleum products that was not present in the Hess case. An oil producer will not stop producing oil due to the New Jersey addback tax because, to do so, it must change the nature of its business. However, a company importing petroleum products into New York State for resale in New York State may well stop engaging in interstate commerce and solely buy and sell petroleum products in New York State. In fact, it can do so without even changing the nature of its business. It need only change the location of its activities.

Sixth, in Hess, the competitors of appellants were not subject to the addback tax operated within and without New Jersey. In contrast, the competitors of petitioners are also not subject to the addback tax, but they operate exclusively in New York State.

The different tax treatment accorded Article 13-A petroleum businesses and non-Article 13-A petroleum resellers arises solely from differences between the location of their activities (purchases of petroleum products wholly or in part outside of New York State, compared to purchases of petroleum products solely within state lines), and not from differences between the nature of their businesses.

Finally, under petitioners' rationale, the addback tax creates a discriminatory classification between petroleum businesses engaged in interstate commerce and domestic petroleum resellers.

This Court stated in Hess that "a tax may violate the commerce clause if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce." Id. at 75. The lower court should have properly applied these words of this Court and concluded that the addback tax impermissibly burdens interstate commerce, and is thus unconstitutional and void.

IV. THE ADDBACK TAX DENIES PETITIONERS EQUAL PROTECTION BY ARBITRARILY, CAPRICIOUSLY AND UNJUSTIFIABLY TREATING THEM DIFFERENTLY, AND THUS MORE HARSHLY THAN OTHER PETROLEUM BUSINESSES AND RESELLERS

The addback tax has created three (3) separate classifications of petroleum resellers:

(1) Article 13-A petroleum businesses, such as petitioners, that derive substantially all gross receipts from New York State sales;

(2) Article 13-A petroleum businesses, such as the major oil companies, that derive the vast preponderance of their gross receipts from non-New York State sales; and

(3) Non-Article 13-A petroleum resellers that compete with petitioners in New York State in the resale of petroleum products, but who are not subject to the GRT.

A regulation and regulatory scheme violates the equal protection clause of the United States Constitution if it is "not rationally related to any legitimate governmental interests." Price v. Cohen, 715 F.2d 87 (3rd Cir. 1983), cert. den. 465 U.S. 1032 (1983). As this Court has stated, "[t]he state . . . may not resort to a classification that is palpably arbitrary." Allied Stores of Ohio, Inc. v. Bowers 38 U.S. 522, 528 (1959). The classification "must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation." F.S. Royster Guano Co. v. Commonwealth of Virginia, 253 U.S. 412, 415 (1920).

In Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1989), this Court invalidated an arbitrary and burdensome classification of insurance companies engaged in interstate commerce under the equal protection clause. The tax statute was designed such that domestic insurance companies paid a lower gross premiums tax rate than out-of-state corporations. Id.

This Court, upon review, discovered that:

> "a foreign insuance company doing the same type and volume of business in Alabama as a domestic company generally will pay three to four times as much in gross premium taxes as its domestic competitor." Id. at 871.

This Court held that since the aim of the law was to favor domestic industry within the state, without regard to the cost to foreign corporations doing business in the state, "encouraging investment in Alabama assets and securities in this plainly discriminatory manner serves no legitimate purposes." Id. at 883. The same should hold true here where the addback tax results in favoring local businesses as opposed to those engaging in both interstate and intrastate commerce.

This Court has been particularly hesitant to find a legitimate state purpose when engaged in an equal protection analysis where there is only post hoc hypotheses about legislative intent. See Schweiker v. Wilson, 450 U.S. 221 (1981). In such instances, the defending state or municipal body carries a heavier burden. Id. The Third Circuit, citing to Schweiker, supra, explained:

> "When no indication of legislative purpose appears other than the current position of the [government], the Court should require that the classification bear a fair and substantial relation to the asserted purpose."

Price v. Cohen, supra, 715 F.2d at 95. (In Price v. Cohen, actual and ample legislative history was extant).

Here, no rational basis can be discerned for creating three (3) separate classifications of petroleum resellers. The only purpose evident in the addback tax is to avoid the wrath of domestic oil companies who engage only in intrastate commerce. There is nothing in the legislative history of the addback tax itself to show that it was enacted to foster a legitimate state interest. See L. 1983, c.400, §§5 and 9.

Indeed, as discussed supra, the New York State Legislature, in its wisdom, repealed the addback tax, albeit prospectively. See L. 1990, c.190, §§212 and 225.

Petitioners are damaged by the classification under the addback tax. The second class of taxpayers who are the multi-state and multi-national oil importers, do not derive the vast majority of their gross receipts from New York State as do petitioners. These huge petroleum businesses can minimize or eliminate their costs relating to the addback tax by use of income allocation formulas. See Container Corp. of America v. Franchise Tax Board, 463 U.S. 159 (1983).

The third class which consists of businesses engaged only in the intrastate purchase and resale of petroleum in New York, are not petroleum businesses. These businesses are not subject to the addback tax even though they usually engage in the same activities and compete for the same customers as do petitioners. Therefore, members of this

third class receive a more favorable rate of tax on their gross receipt than do petitioners.

Accordingly, the addback tax denies petitioners equal protection by arbitrarily, capriciously and unjustifiably treating them differently, and thereby more harshly than other petroleum businesses and resellers.

CONCLUSION

WHEREFORE, for the reasons stated, we request that the Court grant this petition for writ of certiorari.

Dated: Roslyn, New York
April 8, 1994

Respectfully submitted,

CARL S. LEVINE & ASSOCIATES, P.C.
1800 Northern Boulevard
Roslyn, New York 11576
(516) 621-5380

By: _____
Carl S. Levine (CL 1320)
Attorney of Record
Diane J. Moffet
Attorneys for Petitioners

APPENDIX

At an IAS part of the Supreme Court of the State of New York, held in and for the County of Nassau, at the Courthouse located at 100 Supreme Court Drive, Mineola, New York on the 28th day of ~~July~~* August, 1990

PRESENT:

HON. HENDERSON W. MORRISON
Justice

Entered August 29, 1990

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BRAY TERMINALS, INC., DANA BRAY, JR., FORT NECK OIL TERMINALS CORP., ARTHUR MOTZKIN, KINGSTON OIL SUPPLY CORP., M. SPIEGEL & SONS OIL CORP., SLOMINS, INC., S.O.S. OIL CORPORATION, DOUGLAS PORTO, D.W. PORTO, WILLIAM FISCHBECK, WALLACE OIL COMPANY, INC., RAYMOND SLOMIN, SANDRA SLOMIN, IRWIN SLOMIN, EDWARD SLOMIN, BARBARA SALZMAN, LINDA HANDELMAN, SYLVIA SLOMIN, GEORGE SPIEGEL, PEGGY SPIEGEL, MARK SPIEGEL, JUDY LANDERS, RHODA SPIEGEL, ROBERT SPIEGEL, JEFFREY SPIEGEL, JODI SPIEGEL and RICHARD SPIEGEL,

Plaintiffs,

- against -

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,

Defendant.

JUDGMENT

Index No. 24452/89

----------x

Upon reading and filing of the complaint dated October 6, 1989 and the memoranda submitted in support of and in opposition to the defendant's motion to dismiss and upon all other ~~pleadings and~~ papers filed herein and a memorandum decision dated June 19, 1990 having been rendered upon due deliberation in consideration of all ~~pleadings,~~ papers and testimony;*

NOW upon motion of the respondent New York State Commissioner of Taxation and Finance, it is hereby

ORDERED, ADJUDGED and DECREED that the relief requested in the complaint herein is denied in all respects, and the complaint is dismissed; and it is further

ORDERED, ADJUDGED and DECREED that Article 13A and Section 208(9)(b)(4) and 612(b)(28) of the New York State Tax Law are declared to be constitutional as applied to plaintiffs.

ENTER

/s/ Henderson W. Morrison
HENDERSON W. MORRISON
J.S.C.

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* Crossed out in original.

MEMORANDUM

SUPREME COURT
NASSAU COUNTY TRIAL TERM, PART 14

Bray Terminals, Inc., et al.	**By:** Morrison, J.
Plaintiffs,	
	Dated: June 19, 1990
- against -	
New York State Department of Taxation and Finance,	**Index No.:** 24452/89 **Mot. Date:** February 20, 1990
Defendants.	

(See Papers for Full Title)

Levine, Robinson & Algios, P.C
Attorneys for Plaintiffs
50 Charles Lindbergh Boulevard
Mitchel Field, NY 11553

Robert Abrams, Esq.
New York State Attorney General
Elizabeth Bradford, of Counsel
190 Willis Avenue
Mineola, NY 11501

This declaratory judgment action challenges the constitutionality of certain provisions of the Tax Law (Tax Law Article 13A, §208[9][b][4], §612[b][28]). It is alleged

that the interplay of these sections effects a denial of rights guaranteed to the plaintiffs by the Commerce Clause of the United States Constitution and the equal protection guarantees of the federal and state constitutions. (U.S. Constitution Article I §8, Amendment 14, §1, N.Y.S. Constitution Article I, §11). The defendant seeks dismissal of the action and a declaration that the challenged sections of the Tax Law are constitutional as applied to the plaintiffs.

The plaintiffs are corporations and individuals obligated to pay franchise and personal income taxes. They are also "petroleum businesses" subject to a gross receipts tax imposed pursuant to Article 13A. That article imposes a gross receipts tax of 2-3/4% (Tax Law §301) on business entities engaged in the importation or extraction of petroleum. The plaintiffs are importers of petroleum. Some or all of the petroleum imported by the plaintiffs is then sold to other entities further along in the chain of distribution. These entities are also subject to franchise and personal income taxes. The plaintiffs' constitutional claims arise from the treatment afforded them as contrasted with those further along the chain of distribution.

The plaintiffs, charged with the gross receipt tax under Article 13A, pass that tax along, to the extent commercially possible, to the subsequent purchasers. In computing their personal and franchise tax obligations, the subsequent purchasers may deduct the tax passed along as a cost of doing business. However, under the Tax Law, no deduction is allowed for Article 13A taxes in the computation of franchise and personal income taxes. (Tax Law §208[9][b][4][612][b][28]**. This, it is argued, imposes an unconstitutional burden on interstate commerce and violates the guarantee to equal protection of the law in that different entities in the petroleum chain are afforded different treatment.

I have difficulty conceptualizing the prejudice which the plaintiffs allege. Absent an anti pass through provision (Shell Oil v. Tax Commission, 91 AD 2d 81), they can and do factor the non-deductibility of the gross receipts tax into their product cost. Since the gross receipts tax does not operate to accord an advantage to intrastate producers, I can discern no facial invalidity. Rather, it appears to reflect a legislative determination that the tax should be imposed on petroleum products at the point of entry, although I concede that by reason of geography this state must rely on importation to obtain petroleum. However, the fact that a tax may impact on one entity differently than it does on another by virtue of the nature of their business does not effect a constitutional violation. (Amerada Hess Corp. v. Director of the Div. of Taxation, ____U.S.____**, 109 Sup. Ct. 1617.

The defendant is entitled to judgment dismissing the complaint and declaring that Article 13A of the Tax Law as well as Sections 208[9][b][4] and 612[6][28]**, as applied to the plaintiffs, are constitutional.

Submit judgment on notice.

/s/ Henderson W. Morrison
J.S.C.

** Typewritten errors and blanks as in original.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

_____AD2d_____ Argued - December 14, 1992
Entered March 29, 1993

LAWRENCE J. BRACKEN, J.P.
ALBERT M. ROSENBLATT
CORNELIUS J. O'BRIEN
JOHN COPERTINO, JJ.

91-01202

Bray Terminals, Inc., et al.,

Appellants,

v.

DECISION & ORDER

New York State Department of Taxation and Finance,

Respondent.

Levine, Robinson & Algios, P.C., Mitchel Field, N.Y. (Carl S. Levine, Kenneth L. Robinson, and Randa D. Maher of counsel), for appellants.

Robert Abrams, Attorney-General, Mineola, N.Y. (Elizabeth Bradford of counsel), for respondent.

Appeal from a judgment of the Supreme Court, Nassau County (Morrison, J.), entered August 29, 1990.

ORDERED that the judgment is affirmed, with costs, for reasons stated by Justice Morrison at the Supreme Court.

BRACKEN, J.P., ROSENBLATT, O'BRIEN and COPERTINO, JJ, concur.

ENTER:

Martin H. Brownstein
Clerk

March 29, 1993

Entered September 14, 1993

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fourteenth day of September, 1993.

PRESENT, HON. JUDITH S. KAYE,
Chief Judge, presiding.

Mo. No. 1025 SSD 61

Bray Terminals, Inc., et al.,

Appellants,

v. **ORDER**

New York State Department of Taxation and Finance,

Respondent.

The appellants having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

/s/ Stuart M. Cohen
Stuart M. Cohen
Deputy Clerk of the Court

Entered January 13, 1994

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the thirteenth day of January, 1994.

PRESENT, HON. JUDITH S. KAYE,
Chief Judge, presiding.

2-10 Mo. No. 1244

Bray Terminals, Inc., et al.,
Appellants,

v.

New York State Department of Taxation and Finance,
Respondent.

ORDER

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

Judge Titone took no part.

/s/ Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

Article I, Section 8, Clause 3 of the United States Constitution. Regulation of Commerce states in pertinent part that:

> The Congress shall have power . . . to regulate Commerce with foreign Nations, and among several States, and with the Indian Tribes;

Amendment 14, §1. Equal Protection of the Laws of the United States Constitution states in pertinent part:

> * * * nor [shall any state] deny to any person within its jurisdiction the equal protection of the laws.

Section 208(9)(b)(4) of the New York State Tax Law, provides in pertinent part:

Definitions:

As used in this article:

> 9. The term "entire net income" means total net income from all sources, which shall be presumably the same as the entire taxable income which the taxpayer is required to report to the United States treasury department, or which the taxpayer would have been required to report, if it had not made an election under subchapter s of chapter one of the internal revenue code, except as hereinafter provided, and subject to any modification required by paragraphs (d) and (e) of

subdivision three of section two hundred ten of this article . . .

(b) Entire net income shall be determined without the exclusion, deduction or credit of:

. . .

(4) taxes imposed under this article, article thirteen-A and sections one hundred eighty-two, one hundred eighty-two-a and one hundred eighty-two-b of this chapter.[1]

Section 612(b)(28) of the New York State Tax Law provides in pertinent part:

New York adjusted gross income of a resident individual:

(b) Modifications increasing federal adjusted gross income. There shall be added to federal adjusted gross income: . . .

(28) The tax imposed by article thirteen-A of this chapter, to the extent deductible in determining federal adjusted gross income.[2]

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[1] This section was amended, effective May 25, 1990, and all references to Article 13-A and Tax Law §§182, 182-a and 182-b were deleted. See L. 1990, c.190, §§212 and 385(q)(2).

[2] References to the Article 13-A gross receipts tax were omitted from this section by amendment effective May 25, 1990. See

Section 300(c) of the New York State Tax Law provides in pertinent part:

General definitions:

As used in this article:

(c) The term "petroleum business" means every corporation and unincorporated business formed for, engaged in or conducting the business, trade or occupation of importing or causing to be imported (by a person other than one which is subject to tax under this article) into this state for sale in this state, extracting, producing, refining, manufacturing, or compounding petroleum and every corporation and unincorporated business importing or causing to be imported (by a person other than one which is subject to tax under this article) petroleum into this state for consumption by it in this state except that petroleum brought into this state in the ordinary fuel tank connecting with the engine of a motor vehicle propelled by the use of such petroleum, and to be used only in the operation thereof, shall not be deemed imported for consumption in this state, if not removed from such tank except as used in the propulsion of such engine.[3]

L. 190, c.190, §§225 and 385(q)(2).

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[3] Subd. (c) was omitted by amendment effective May 25, 1990. The definition of petroleum business now appears in Subd. (b). See L. 1990, c. 190, §214.

Section 301(a) of the New York State Tax Law provides in pertinent part:

Imposition of tax

> (a) [See, also, subd. (a) below. For application, see Effective Date note below.] General.--Notwithstanding any other provision of this chapter, or of any other law, for the period beginning with taxable years commencing on or after the first day of July, nineteen hundred eighty-three, but including that portion of any taxable year commencing prior thereto to the extent of that portion of such year which includes the period which commences with the first day of July, nineteen hundred eighty-three, and ending with but not including taxable years commencing on or after the first day of April, nineteen hundred eighty-four, but including that portion of any taxable year commencing prior thereto to the extent of that portion of such year which includes the period which terminates with the thirty-first day of March, nineteen hundred eighty-four, there is thereby imposed upon every petroleum business, for the privilege of engaging in business, doing business, employing capital, owning or leasing property, or maintaining an office in this state, for all or any part of each of its taxable years, an annual tax equal to three and one-quarter per centum of its gross receipts from sales of petroleum where shipments are made to points within the state. In no event shall the tax imposed by this article be less than two hundred fifty dollars.

(a) [See, also, subd. (a) above. For application, see Effective Date note below.] General.--Notwithstanding any other provision of this chapter, or of any other law, for taxable years commencing on or after the first day of April, nineteen hundred eighty-four, but including that portion of any taxable year commencing prior thereto to the extent of that portion of such year which includes the period which commences with the first day of April, nineteen hundred eighty-four, there is hereby imposed upon every petroleum business, for the privilege of engaging in business, doing business, employing capital, owning or leasing property, or maintaining an office in this state, for all or any part of each of its taxable years, an annual tax equal to two and three-quarters per centum of (i) its gross receipts from sales of petroleum where shipments are made to points within the state, and (ii) the consideration given or contracted to be given by it for petroleum which it imported or caused to be imported (by a person other than one which is subject to tax under this article) into this state for consumption by it in this state. In no event shall the tax imposed by this article be less than two hundred fifty dollars.[4]

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[4] Subd. (a), set out first, was effective June 30, 1983. See L. 1983, c.400, §22. It was amended by subd. (a), set out second, which became effective April 11, 1984. See L. 1984, c.67, §2. Subd (a), set out second, was later amended by L. 1987, c.641, §2 and L. 1990, c.190, §215.